

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

SANDRA SHAW,

Plaintiff,

v.

U.S. DEPARTMENT OF JUSTICE,

Defendant.

2:08-CV-01044-LRH-LRL

ORDER

This is an appeal of the United States Department of Justice’s denial of Plaintiff Sandra Shaw’s claims under the Radiation Exposure Compensation Act, 42 U.S.C. § 2210 Note (“RECA”).

I Facts and Procedural History

Plaintiff is the daughter of Paul G. Elledge and Robbie Sue Elledge, both of whom are deceased. On July 12, 2007, Plaintiff filed two RECA claims on her parents’ behalf.¹

A. Paul G. Elledge Claim

In the claim filed on behalf of her father, Paul Elledge, Plaintiff alleged that Paul contracted lung cancer following exposure to “fallout emitted during the Government’s atmospheric nuclear tests.” *See* 42 U.S.C. § 2210 Note, Sec. 2(a)(1). Plaintiff alleged that Paul was exposed to the

¹Section 6(c)(4) authorizes survivors, including surviving children, to file claims and receive payments on behalf of eligible individuals who are deceased.

1 fallout while in (1) Hayden, Gila County, Arizona, in 1941, (2) Franklin, Greenlee County,
2 Arizona, and in Seattle, King County, Washington, from 1951 to 1958, and (3) Hayden, Gila
3 County, Arizona, from May through August of 1962.

4 Although Plaintiff based her original claim on each of these allegations, Plaintiff appealed
5 only the government's conclusions concerning her father's presence in Hayden, Arizona, in 1962.
6 Accordingly, the court will limit its review to this aspect of Plaintiff's claim.

7 To establish her father's presence in Hayden, Plaintiff submitted a variety of evidence,
8 including handwritten home rental receipts, a letter, a card, a recreational diploma, a store receipt,
9 and two photographs. In addition, before entering a final decision, the Assistant Director twice
10 gave Plaintiff an opportunity to submit additional evidence in support of her claim. In doing so, the
11 Assistant Director thoroughly reviewed each piece of evidence and explained to Plaintiff why the
12 evidence was insufficient. In response, Plaintiff submitted a letter and two personal statements.

13 The Assistant Director reviewed Plaintiff's evidence and concluded that the evidence was
14 insufficient to establish her father's presence in Hayden during the summer of 1962. In particular,
15 the Assistant Director determined that Plaintiff's evidence either did not reflect Paul's presence in
16 Hayden in 1962 or did not bear sufficient indicia of authenticity to meet the RECA regulation's
17 trustworthiness standard.

18 On March 19, 2008, the government received Plaintiff's appeal of her claim's denial. As
19 noted above, Plaintiff appealed only the Assistant Director's conclusion that her father was not
20 present in Hayden, Arizona, in 1962. In support of her appeal, Plaintiff cataloged the previously
21 submitted evidence and again declared that in 1962, she lived in Hayden with her parents.

22 On June 12, 2008, the Appeals Officer affirmed the denial of Plaintiff's claim. In doing so,
23 the Appeals Officer found that the Assistant Director conducted a thorough evaluation of each
24 piece of evidence. The officer further found that the Assistant Director's conclusion that much of
25 the evidence failed to meet the trustworthiness standard set forth in 28 C.F.R. § 79.5(b) was sound
26

1 and reasonable.

2 **B. Robbie Sue Elledge Claim**

3 On July 12, 2007, Plaintiff also filed a RECA claim on behalf of her deceased mother,
4 Robbie Sue Elledge. Plaintiff alleged that her mother contracted cancer of the stomach and colon
5 following exposure to fallout emitted during the government's atmospheric nuclear tests while she
6 was present in Gila County, Arizona, for an unspecified period of time.

7 The Assistant Director rejected Plaintiff's claim. In particular, after giving Plaintiff time to
8 submit additional evidence and after reviewing the evidence, the Assistant Director concluded that
9 the medical records did not support Plaintiff's assertion that her mother contracted stomach and
10 colon cancer. Instead, the records indicated that her mother was diagnosed with recurrent cervical
11 cancer. In a letter dated July 30, 2007, and in the subsequent decision dated October 10, 2007, the
12 Assistant Director explained to Plaintiff that cervical cancer is not a compensable disease under
13 RECA. As such, the Assistant Director denied Plaintiff's claim.

14 On March 19, 2008, the government received Plaintiff's appeal. On June 12, 2008, the
15 Appeals Officer affirmed the denial, agreeing that the medical evidence did not demonstrate that
16 Robbie Sue acquired stomach and colon cancer.

17 **II. Statutory and Regulatory Background**

18 In 1990, Congress enacted RECA to recognize and compensate individuals for injuries
19 suffered as a result of this country's nuclear research and weapons program. 42 U.S.C. § 2210
20 Note, Sec. 2(a). In particular, RECA provides for compensation to individuals who have
21 contracted certain diseases from (1) exposure to radiation resulting from 'downwind fallout[,]'' (2)
22 underground uranium mining, and (3) participation at atmospheric nuclear testing sites.

23 Through RECA, Congress directed the Attorney General to establish regulations and
24 procedures through which individuals suffering from the specified injuries could submit claims for
25 compensation. Pursuant to this authority, in 1992, the Attorney General created the Radiation
26

1 Compensation Exposure Program (“RECP”), which is charged with administering RECA.

2 After a claim for compensation is submitted to the RECP, the RECP’s Assistant Director
3 reviews the claim and all supporting documentation and renders a decision accepting or denying the
4 claim. *See* 28 C.F.R. § 79.72. In determining whether claims meet the requirements of the Act,
5 RECA directs the Attorney General to resolve all doubt in favor of the claimant.

6 A claimant seeking to appeal the Assistant Director’s decision may do so by submitting a
7 written request for appeal within sixty days of the date of the Assistant Director’s decision.
8 28 C.F.R. § 79.73(a). The decision of the Appeal’s Officer is a final agency action entitling the
9 claimant to seek judicial review in a district court of the United States. 28 C.F.R. §§ 79.73(d), (e).
10 RECA directs the reviewing district court to “review the denial on the administrative record and
11 [to] hold unlawful and set aside the denial if it is arbitrary, capricious, an abuse of discretion, or
12 otherwise not in accordance with the law.” 42 U.S.C. § 2210 Note, Sec. 6(l).

13 Review under the arbitrary and capricious standard is narrow, and the court must not
14 substitute its own judgment for that of the agency. *Lands Council v. McNair*, 537 F.3d 981, 987
15 (9th Cir. 2008) (en banc) (citations omitted).² Nonetheless, the court must “engage in a substantial
16 inquiry” and a “thorough, probing, in-depth review.” *Or. Natural Res. Council Fund v. Brong*, 492
17 F.3d 1120, 1125 (9th Cir. 2007) (quoting *Native Ecosystems Council v. U.S. Forest. Serv.*, 418 F.3d
18 953, 960 (9th Cir. 2005)). To meet its burden under this standard, an agency must present a
19 “rational connection between the facts found and the conclusion made.” *Id.* Thus, “the court will
20 reverse a decision as arbitrary and capricious only if the agency relied on factors Congress did not
21 intend it to consider, entirely failed to consider an important aspect of a problem, or offered an
22 explanation that runs counter to the evidence before the agency or is so implausible that it could not

23
24 ²Although the decision in *Lands Council* and the remaining decisions cited in this paragraph address
25 the standard of review under the Administrative Procedures Act, that standard is identical to the standard set
26 forth in RECA. *See* 5 U.S.C. § 706(2)(a) (“The reviewing court shall . . . hold unlawful and set aside agency
action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion or otherwise not in
accordance with law[.]”)

1 be ascribed to a difference in view or the product of agency expertise.” *Lands Council*, 537 F.3d at
 2 987 (citations and internal quotations omitted).

3 **III. Discussion**

4 Plaintiff applied for an award under the “downwinder” provisions of RECA, which are
 5 designed to compensate victims exposed to fallout from above-ground nuclear testing conducted by
 6 the United States at the Nevada Test Site. A claimant seeking to establish a downwinder claim
 7 must satisfy a two-part test. First, the claimant must demonstrate that she was physically present in
 8 an “affected area” for at least two years from January 21, 1951, through October 31, 1958, or for
 9 the entire period beginning June 30, 1962, through July 31, 1962. 42 U.S.C. § 2210 Note, Sec.
 10 4(a)(2). The “affected areas” RECA identifies includes, “in the State of Arizona, the counties of
 11 Coconino, Yavapai, Navajo, Apache, and Gila, and that part of Arizona that is north of the Grand
 12 Canyon.” 42 U.S.C. § 2210 Note, Sec. 4(b)(1)(C).

13 Second, the claimant must demonstrate that after her presence in an affected downwind area
 14 for the specified period, the claimant developed a “specified disease[.]” *See* 42 U.S.C. § 2210
 15 Note, Sec. 4(a)(2). Provided that the onset of the disease is at least five years after the first
 16 exposure, the “specified diseases” covered by the Act include multiple myeloma, lymphomas (other
 17 than Hodgkin’s disease), and primary cancer of the thyroid, male or female breast, esophagus,
 18 stomach, pharynx, small intestine, pancreas, bile ducts, gall bladder, salivary gland, urinary bladder,
 19 brain, colon, ovary, liver (except if cirrhosis or hepatitis B is indicated), or lung. 42 U.S.C. § 2210
 20 Note, Sec. 4(b)(2).

21 **A. Paul Elledge Claim**

22 The government argues that the court should deny Plaintiff’s appeal because the RECP
 23 reasonably determined that Plaintiff’s documentation lacked sufficient indicia of authenticity and
 24 trustworthiness to establish Paul’s presence in Hayden, Arizona, from June 30, 1962, to July 31,
 25
 26

1 1962.³ To demonstrate her father's presence in Hayden, Arizona, Plaintiff submitted the following
 2 evidence: (1) four torn squares of paper described as receipts given to Paul by his landlord for rent
 3 paid between May 1, 1962, and August 1, 1962; (2) a three-page letter dated July 21, 1962, that
 4 begins "Dear Paul," is signed by "Gene[.]" and includes a note from "Carol" asking whether Sandra
 5 likes Hayden and stating that she and Gene would come visit "this August 62"; (3) an undated
 6 "New Year" card with no accompanying envelope, but a note on the back of the card stating "July
 7 1962" and "Paul Sue and Sandra, Charlie missed Sandra how is Hayden?"; (4) square dancing
 8 diplomas issued to Paul and his wife at an unidentified location on April 5, 1963; (5) a receipt
 9 issued to Paul's wife on April 12, 1963, in San Manuel, Pinal County, Arizona; (6) a photograph
 10 of a man with an airplane, with the words "taken just after Paul's first flying lesson 2-11-73"
 11 handwritten across the top; (6) an undated photograph of a man, child, and dog; and (7) two
 12 "personal statements."

13 To establish proof of physical presence in an affected area, a claimant may submit "any
 14 trustworthy contemporaneous record that, on its face or in conjunction with other such records,
 15 establishes that the claimant was present in the affected area for the requisite period during the
 16 designated time period." 28 C.F.R. § 79.13(a). Examples of acceptable records include
 17 governmental records, records of accredited educational institutions, utility records, library records,
 18 historical society records, records of religious organizations, business records, records of
 19 recognized civic or fraternal organizations, and medical records. *Id.* In addition, claimants may
 20 submit original postcards and envelopes, bearing a postmark and a cancelled stamp, from letters
 21 addressed to the claimant or an immediate family member during the requisite time period. *Id.*

22 In reviewing the evidence a claimant submits in support of a claim, the RECP may only
 23 consider evidence that bears "sufficient indicia of authenticity or a sufficient guarantee of
 24 trustworthiness." 28 C.F.R. § 79.5(b). Likewise, the RECP cannot consider evidence that is in
 25

26 ³It is undisputed that Hayden is located in Gila County, Arizona, an "affected area" covered by RECA.

1 “such a physical condition, or contains such information, that otherwise indicates the record or
2 document is not reliable or trustworthy.” *Id.*

3 Here, after reviewing the Assistant Director’s decision and the evidence Plaintiff submitted
4 in support of her claim, the Appeals Officer concluded that it was “fair and reasonable” for the
5 Assistant Director to conclude that Plaintiff’s evidence failed to meet the trustworthiness standard
6 set forth in 28 C.F.R. § 79.5(b). The court agrees. The Assistant Director carefully and thoroughly
7 reviewed Plaintiff’s evidence. Noting the inconsistencies and lack of information contained in the
8 documents, the Assistant Director articulated a rational connection between the evidentiary
9 deficiencies and the denial of her claim by explaining why the documents did not meet RECA’s
10 trustworthiness standards.⁴ Likewise, the Assistant Director properly refused to consider Plaintiff’s
11 personal statements because, in reviewing a claim, the RECP is to accept and consider written
12 affidavits or declarations only in certain limited circumstances, none of which are relevant to this
13 case. *See* 28 C.F.R. § 79.5(c).

14 The court has reviewed the administrative record and the parties’ arguments and
15 finds that nothing before the court suggests that the RECP’s denial of Plaintiff’s claim was
16

17 ⁴For example, as to the square dancing diplomas, the Assistant Director explained that the diplomas
18 did not support Plaintiff’s claim because the receipts did not reflect the location of the classes. Likewise, the
19 Assistant Director did not consider the receipt issued to Plaintiff’s mother from Pinal County, Arizona, because
20 Pinal County is not included in RECA’s designated affected areas. With regard to the photographs, the
Assistant Director also concluded that the photographs did not support Plaintiff’s claim because Plaintiff failed
to present evidence indicating that they were taken in an affected area during the statutory exposure period.

21 With regard to the July 21, 1963, letter to Paul signed by “Gene[,]” the Assistant Director explained
22 that nothing in the letter reflected Paul’s address and that the note on the last page asking whether “Sandra likes
Hayden,” was written in a distinctly different handwriting. The Assistant Director further noted that the
greeting card dated July, 1962, was also written in two distinctly different handwriting styles. The Assistant
Director then concluded that neither the letter nor the card established Paul’s presence in Hayden, Arizona,
during July of 1962, because the documents did not bear sufficient indicia of authenticity.

24 Finally, as to the rental receipts, the Assistant Director concluded that the receipts did not contain any
25 notation establishing an address for Paul during the time described. Further, the Assistant Director stated that
the differences in handwriting on the rental receipts, as well as the letter and card, undermined the reliability
of those documents. As such, the Assistant Director refused to accept the documents as proof of Paul’s
26 presence in Hayden.

1 arbitrary, capricious, an abuse of discretion, or otherwise in violation of the law. Based on the lack
2 of information and inconsistencies contained in Plaintiff's evidence, it was reasonable for the RECP
3 to conclude that Plaintiff's evidence did not meet the standards enumerated in 28 C.F.R. § 79.13(a)
4 and 28 C.F.R. § 79.5(b). Further, the RECP provided Plaintiff ample opportunity to submit
5 additional documentation to confirm Paul's residence in Hayden, Arizona, during the relevant time
6 period, and Plaintiff was unable to do so. Accordingly, as to the claim filed on behalf of Plaintiff's
7 father, the court will deny Plaintiff's appeal.

8 **B. Robbie Sue Elledge Claim**

9 The RECP also denied Plaintiff's claim filed on behalf of her mother, Robbie Sue, finding
10 that Plaintiff's evidence did not establish that her mother contracted a compensable disease.⁵ While
11 Plaintiff alleged that her mother contracted cancer of the stomach and the colon, and while section
12 4(b)(2) of the Act covers both of these conditions, the Assistant Director found that the medical
13 evidence consistently demonstrated that Robbie Sue had metastatic cervical carcinoma. The
14 Assistant Director further concluded that RECA does not cover this disease.

15 After reviewing the medical evidence, the Appeals Officer likewise concluded that Robbie
16 Sue had cervical cancer, not stomach or colon cancer. The Appeals Officer further agreed with the
17 Assistant Director's reasoning distinguishing stomach and abdominal cancer and concluding that
18 RECA did not provide compensation for cervical cancer.

19 The court has reviewed the administrative record and the parties' arguments and finds the
20 RECP's finding were not arbitrary, capricious, an abuse of discretion, or otherwise in violation of
21 the law. Based on the medical evidence before the RECP and the statutory text, it was reasonable
22 for the RECP to conclude that Robbie Sue had cervical cancer and that cervical cancer is not a
23

24
25 ⁵Here, as before the Appeals Officer, Plaintiff does not specifically challenge this finding. Nonetheless,
26 because Plaintiff challenges the Appeals Officer's decision generally and because the Appeals Officer
considered whether Robbie Sue contracted a compensable disease, this court will review that decision.

1 compensable disease.⁶ Accordingly, the court will affirm the RECP's denial of Plaintiff's claim.

2 **IV. Conclusion**

3 The court understands Plaintiff's frustration, and the court emphasizes that nothing in this
4 order should be read to suggest that Plaintiff has acted in an untrustworthy manner. Nonetheless,
5 under RECA and its governing regulations, the RECP is permitted to consider evidence only if it
6 meets certain standards. The RECP has concluded that Plaintiff's evidence does not meet these
7 standards, and the RECP has thoroughly and reasonably articulated its reasons for so finding.
8 Under these circumstances, the court must deny Plaintiff's appeal.

9 IT IS THEREFORE ORDERED that Plaintiff's RECA appeal is DENIED.

10 The Clerk of the Court shall enter judgment accordingly.

11 IT IS SO ORDERED.

12 DATED this 9th day of June, 2010.



13
14
15 LARRY R. HICKS
UNITED STATES DISTRICT JUDGE

16
17
18
19
20
21
22
23
24
25 ⁶Further, even if Plaintiff had submitted evidence indicating that her mother suffered from a covered
26 disease, Plaintiff has not established that her mother was present in an affected area during the relevant time
period.